No. 98-1772

IN THE

Supreme Court of the United States

JEHAN ZEB MIR, M.D.,

Petitioner,

v.

FHP, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there a conflict between the Circuit Courts, as to the processing of Federal Rules of Civil Procedure, Rule 60(b) motions during the pendancy of an appeal?

STATEMENT PURSUANT TO RULE 29.6

The following parent companies, subsidiaries and affiliates of Respondent FHP, Inc., have issued shares to the public:

a. PacificCare, Inc.

b. PacificCare Health Systems, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Summary of Argument	1
Statement of the Case	2
A. The Ninth Circuit Procedurally Processed MIR's Request For Rule 60 Relief In A Manner Substantially Similar To That Employed By Other Circuits	6
B. The District Court Cannot Grant A Rule 60(b) Motion, While An Appeal Is Pending, Without An Appellate Remand	10
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Aldrich Ent. Inc. v. United States, 938 F.2d 1134 (10th Cir. 1991) 7

Brown v. United States, 976 F.2d 1104 (7th Cir. 1992) 7

Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39 (1st Cir. 1979) 6, 7

First Nat. Bk. of Salem v. Hirsch, 535 F.2d 343 (6th Cir. 1976) 7

Hoai v. Vo, 935 F.2d 308 (D.C. Cir. 1991) 7

Pioneer Insurance Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977) 7

Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976) .10, 11, 13, 14

Stein v. Wood, 127 F.3d 1187 (9th Cir. 1997) ..11, 12, 13

Stone v. I.N.S., 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) 13, 14

Toliver v. County of Sullivan, 957 F.2d 47 (2nd Cir. 1992) 7

Cited Authorities

	Page
Travelers Ins. Co. v. Liljeberg, Inc., 38 F.3d 1404 (5th Cir. 1994)	7
United States v. Acc. Nos. 3034504504 and 144-07143, 971 F.2d 974 (3rd Cir. 1992)	7
Wilkin v. Sunbeam Corp., 405 F.2d 165 (10th Cir. 1968)	14
Statutes:	
29 U.S.C. §§ 1001-1461	2
Rules:	
Federal Rules of Civil Procedure 23	12
Federal Rule of Civil Procedure 60(b)	*passim*
Other Authorities:	
12 Moore's Federal Practice, 60.67[2][c] (Matthew Bender, 3rd Edition)	8
11 *Wright & Miller*, Federal Practice & Procedure, Section 2873 (1994 Supp.)	14

TABLE OF APPENDICES

Page

Appendix A — Notice Of Appeal Dated March 18, 1997 And Filed March 19, 1997 ..... 1a

SUMMARY OF ARGUMENT

The Writ should be denied for the following reasons:

1. There is no substantive conflict, between the Circuits, as to the processing of Federal Rules of Civil Procedure, Rule 60(b) motions filed more than ten days after the entry of an order that is being reviewed on appeal.

2. The District Court effectively reviewed and denied Petitioner's request for relief, under Rule 60(b), on the merits. Thus, Petitioner was treated similar to litigants in other Circuits when the District Court notified him that he had not stated any grounds "that would justify the extraordinary relief requested". (App. E:2; all Appendix references are to the Appendix attached to Mir's Petition unless indicated otherwise).

3. The District Court did not have authority to grant a Rule 60(b) motion, during the pendancy of an appeal, without a remand from the Appellate Court.

4. The Petition is meritless because the District Court held that Petitioner had failed to state sufficient reasons for the granting of Rule 60(b) relief. Hence, the relief was denied after a review on the merits. It is therefore irrelevant as to whether the District Court had the power to grant the requested relief as it concluded that Petitioner had failed to establish an entitlement thereto.

5. Petitioner never filed a Notice of Appeal from the District Court's Order denying Petitioner's "Motion To Grant Hearing On Rule 60(b) Motion".

STATEMENT OF THE CASE

As of May 12, 1991, Bernardino Ruedas was covered by an employee health care group plan administered by FHP, Inc. (App. A:2 and G:6). Mr. Ruedas was stabbed while at a party in Long Beach, California and thereafter treated by Petitioner JEHAN ZEB MIR, M.D. (hereinafter "MIR") at St. Francis Hospital's Emergency Room in Lynwood, California (App. G:7). Mr. Ruedas died while under Petitioner's medical care and MIR thereafter excessively billed FHP $11,275 for emergency medical services (App. G:7 and G:8). FHP contested these fees as unreasonable and excessive. On August 25, 1994, MIR filed a First Amended Complaint, against FHP, in the Los Angeles County Superior Court (hereinafter "MIR #1") (App. G:7).

On September 14, 1994, FHP removed MIR #1 to the United States District Court for the Central District of California (App. G:9). The basis for the removal was preemption by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA") (App. A:1 and G:9). The action was thereafter litigated by the parties. On January 11, 1995, FHP requested that MIR dismiss all claims on the grounds of ERISA preemption (App. G:9). On January 19, 1995, FHP offered to settle for $5,500 even though the claims were preempted by ERISA (App. F:4). Petitioner, a hardheaded individual, refused to compromise his excessive billings and instead demanded full payment together with interest thereon (App. F:4). On January 20, 1995, after MIR had rejected FHP's settlement offer, MIR's counsel withdrew and Petitioner then represented himself (App. F:4).

FHP filed a motion for summary judgment on February 7, 1995, and, on February 8, 1995, again offered to compromise for $5,500 (App. F:4-5). MIR then filed an untimely motion for remand on February 24, 1995 (App. F:4-5). After further settlement discussions, MIR verbally agreed to settle for $6,000 (App. F:5). The oral agreement was to be reduced into a written form (App. F:4-9). FHP then sent the written settlement agreement to MIR on March 14, 1995, and confirmed that the $6,000 would be sent, as agreed, once the agreement was signed (App. F:6).

On March 15, 1995, MIR and FHP signed a Stipulation taking their two motions off calendar because " 'the parties have entered into a settlement of this dispute. . . .' " (App. F:6-7). The District Court then dismissed MIR #1 on April 10, 1995 (App. F:8). On or before April 21, 1995, MIR retained attorney Robert Walker to negotiate a better deal. Between March 14, 1995 and June 15, 1995, FHP repeatedly contacted MIR and his new counsel, Robert Walker, and inquired as to when the settlement agreement would be signed (App. F:5-9). During this time, neither MIR nor attorney Walker notified FHP that MIR wanted to re-negotiate.

On May 3, 1995, MIR secretly filed a second action, against FHP, in the Los Angeles County Superior Court (hereinafter "MIR #2"). The original complaint was not served on FHP (Petition, Page 8). MIR #2 sought to recover the same damages already settled in MIR #1 (App. F:10-11). MIR filed a First Amended Complaint, in MIR #2, and served same in October of 1995 (App. F:10-11 and Petition, Page 8). FHP again removed the action to the United States District Court on November 3, 1995 (App. F:11).

On November 13,1995, FHP filed a counterclaim against MIR based upon his irrational breach of the settlement (App. F:11-12). The counterclaim alleged MIR had breached the settlement by (1) refusing to execute the written settlement agreement; (2) failing to dismiss MIR #1; and (3) filing MIR #2 (App. F:11-12). The damages sought by FHP included compensatory damages, attorney's fees, interest and costs (App. F:12). No answer was filed in the counterclaim and a default was entered, against MIR, on December 19, 1995 (App. F:12-13).

FHP filed a motion for summary judgment, in MIR #2, on May 24, 1996 and a hearing was set for June 17, 1996 (App F:13). The motion for summary judgment was deliberately not opposed although both MIR and his attorney admittedly knew about, and discussed, the motion (App. F:14 and F:19-23). On June 14, 1996, FHP's counsel, Francis M. Drelling, verbally discussed the summary judgment motion with MIR's counsel, attorney Walker (App. F:21). During this discussion, attorney Drelling notified attorney Walker the motion was proceeding forward (App. F:21). It was also on June 14, 1996, that attorney Drelling, via facsimile and U.S. mail, sent a letter to attorney Walker confirming their conversation (App. F:21). Neither attorney Walker, nor Petitioner, appeared at the summary judgment hearing (App. F:14 and F:21-22). The District Court then properly granted summary judgment to FHP (App. F:14, 15).

FHP thereafter filed a motion to recover its legal fees in the sum of $19,491.25 (App. F:1-24). FHP's motion was granted and it was awarded $19,491.25 (App. F:1-24). The District Court's Order granting FHP's attorney fee motion was entered on February 19, 1997. On March 19, 1997, MIR

filed a Notice of Appeal "from the summary judgment and amended judgment . . ." (FHP's Appendix A at 2a — attached hereto).

On April 18, 1997, MIR filed a "Motion to Grant Hearing on Rule 60 Motion" (App. E:1 and Petition, Page 9). In ruling on the Motion, the District Court stated, "[t]he motion is Denied. The Court no longer has jurisdiction over the case. No grounds are stated that would justify the extraordinary relief requested." (App. E:2). MIR never filed a notice of appeal as to this ruling. Petitioner next requested the Ninth Circuit Court of Appeals to remand the case so MIR could proceed with a Rule 60(b) motion (Petition, Page 10). The Appellate Court denied the application without prejudice to refiling same with proof that the District Court desired to consider such a motion (App. C:2). MIR never again sought to provide additional facts to the District Court as to a Rule 60(b) motion. Instead, MIR sought a clarification of the Appellate Court's denial (App. D:2). MIR's request was denied, with a notation that the case was ready for calendaring (App. D:2).

The Ninth Circuit Court of Appeals thereafter affirmed the District Court's entry of judgment, the award of attorney's fees and the denial of MIR's Rule 60(b) request (App. A:1-7). MIR now seeks a review of the District Court's Order denying his request for a "hearing" on a Rule 60(b) motion.

Finally, FHP notes that MIR's Petition improperly contains a number of factual misrepresentations and that it repeatedly relies upon disputed facts never established before any of the lower courts. FHP will not attempt to point out all of the inaccuracies as they have no bearing on the

limited legal issue now pending. FHP will, however, briefly respond to a few of the Petitioner's misrepresentations. Firstly, Petitioner falsely claims that FHP refuses to pay him the $6,000 that he is to receive pursuant to the settlement. The truth is that FHP literally sent MIR the $6,000 settlement check but he refused to cash it and physically returned it to FHP's counsel. Although beyond the record, the presentation, and knowing rejection, of the settlement funds can be proven by documentary evidence. Secondly, FHP did not unilaterally notify the District Court of the settlement. FHP and MIR jointly notified the court of the settlement (App. F:6-7). Thirdly, Petitioner is not a blameless lamb being victimized by FHP and/or the judicial system. Rather, Petitioner is a highly seasoned litigator that abuses the system at every opportunity. In fact, it is MIR's meritless legal maneuvers that are causing FHP to incur unnecessary legal fees in a sum now exceeding $40,000 with no end in sight.

A. The Ninth Circuit Procedurally Processed MIR's Request For Rule 60(b) Relief In A Manner Substantially Similar To That Employed By Other Circuits

The keystone to Petitioner's argument is that there is a conflict between the Circuits as to the manner in which requests for Rule 60(b) relief are processed. MIR's petition essentially argues that all Circuits, except the Ninth Circuit, allow the District Court to hold hearings on, and thereafter grant, Rule 60(b) motions even though (a) there is an appeal pending; and (b) the Rule 60(b) motion was filed more than ten days after the order being appealed. MIR supports this assertion by citing, without further comment, to a number of cases: *Commonwealth of Puerto Rico v. SS Zoe*

Colocotroni, 601 F.2d 39 (1st Cir. 1979); *Toliver v. County of Sullivan*, 957 F.2d 47 (2nd Cir. 1992); *United States v. Acc. Nos. 3034504504 and 144-07143*, 971 F.2d 974 (3rd Cir. 1992); *Travelers Ins. Co. v. Liljeberg, Inc.*, 38 F.3d 1404 (5th Cir. 1994); *First Nat. Bk. of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976); *Brown v. United States*, 976 F.2d 1104 (7th Cir. 1992); *Pioneer Insurance Co. v. Gelt*, 558 F.2d 1303 (8th Cir. 1977); *Aldrich Ent. Inc. v. United States*, 938 F.2d 1134 (10th Cir. 1991); and *Hoai v. Vo*, 935 F.2d 308 (D.C. Cir. 1991).

A review of Petitioner's cases reveals that they do not state that (a) litigants are somehow entitled to "hearings" on Rule 60(b) motions during the pendancy of an appeal; and (b) District Courts can grant rule 60(b) relief, while an appeal is pending, without the need for a remand. They do, however, contain statements of law providing that (1) the District Court has jurisdiction to deny, but not grant, a Rule 60(b) motion during the pendancy of an appeal; and (2) if the District Court is inclined to grant a Rule 60(b) motion, then it is free to so indicate and an appellate remand can thereafter be obtained. *See, e.g., First Nat. Bank of Salem v. Hirsch*, 535 F.2d at 345 n.1 (appeal transfers jurisdiction to appellate court); *Brown v. United States*, 976 F.2d at 1110-1111 (appellate remand necessary in order to grant 60(b) relief while appeal pending); *Pioneer Ins. Co. v. Gelt*, 558 F.2d at 1311-12 (remand necessary prior to trial court's grant of Rule 60(b) motion during appeal); and *Aldrich Ent. Inc. v. United States*, 938 F.2d at 1143 (trial court lacks jurisdiction to grant 60(b) relief, during appeal, without remand). Hence, even Petitioner's authorities provide that an appellate remand is necessary before a District Court can grant Rule 60(b) relief once an appeal has been filed.

The Ninth Circuit simply holds that District Courts have no jurisdiction to rule on a Rule 60(b) motion, during an appeal, and that litigants should first obtain an appellate remand once the District Court has expressed an interest in granting relief. The Ninth Circuit's procedure is thus substantially similar to that used by the other Circuits. The Ninth Circuit's procedure is described by 12 Moore's Federal Practice, 60.67[2][c] (Matthew Bender, 3rd Edition):

> . . . in the Ninth Circuit, the approved procedure is closer to the current procedure in the remaining circuits . . . than to the old rule that appellate court permission was needed before any action could take place in the District Court. The proper Ninth Circuit procedure is to . . . "ask the District Court whether it wishes to entertain the motion, or to grant it, and then move . . . [the appellate] court . . . for remand of the case." This "asking" the District Court if it wants to grant the motion does not seem to be so different than simply allowing the District Court to consider and possibly deny the motion on its merits, and requesting a remand only when the District Court indicates a desire to grant the motion.

Thus, the Ninth Circuit simply has the litigants inquire if the District Court would favorably consider a Rule 60(b) motion. If the response is in the affirmative, then the movant can proceed to request a remand from the Appellate Court. The Ninth Circuit's procedure is therefore similar to the other Circuits as the court is free to deny the request and this is substantially the same as denying the motion. Furthermore, the requesting of an remand is the same manner in which litigants in other Circuits obtain Rule 60(b)

relief during the pendancy of an appeal. Thus, there is no substantive conflict between the Circuits as to the processing of requests for relief under Rule 60(b).

In this instance, MIR filed a motion, in the District Court, wherein he requested the court to "grant hearing on Rule 60 motion." This motion was supported by a declaration and a legal memorandum. The District Court substantively reviewed the motion and issued an order in compliance with proper procedure (App. E:1-2). Firstly, the Order indicated that the District Court lacked jurisdiction due to the pendancy of the appeal. Secondly, the District Court ruled "no grounds are stated that would justify the extraordinary relief requested." (App. E:2).

The District Court's statement that Petitioner had failed to present sufficient grounds to support Rule 60(b) relief confirms that the court did consider Petitioner's request on the merits. The fact that MIR did not entitle his request as a "motion for Rule 60(b) relief" is meaningless. In other words, the title of the motion (i.e., "To Grant Hearing On Rule 60(b) Motion" instead of "Motion for Relief") is a distinction without a meaning. The fact is that the District Court did review the reasons proffered in support of granting Rule 60(b) relief. It is a further fact that the District Court decided that Petitioner's facts did not support the granting of relief. Thus, Petitioner's request was treated similar to those made by litigants in other Circuits. The fact that the District Court's ruling came via a "Motion To Grant Hearing on Rule 60 Motion" instead of a "Motion For Relief" is irrelevant.

Based upon the foregoing, the Writ should be denied as there is no conflict between the Circuits.

B. The District Court Cannot Grant A Rule 60(b) Motion, While An Appeal Is Pending, Without An Appellate Remand

As noted above, the District Court's Order reveals that Petitioner's request for Rule 60(b) relief was reviewed and denied, on the *merits* (App. E:2). The ability of the District Court to grant Rule 60(b) relief, during the pendancy of an appeal, is therefore irrelevant as the request was considered and denied. MIR's Petition is nothing but an abusive last ditch effort to delay the consequences of his bad faith breach of the settlement agreement. Nevertheless, FHP will now address the assertion that District Courts have jurisdiction to grant Rule 60(b) relief, during the pendancy of an appeal, without the need for an appellate remand.

As discussed in the prior section, Petitioner himself cites a number of Circuit Court cases stating that the District Court can deny, but not grant, a Rule 60(b) motion during an appeal. These cases further support the proposition that a District Court can only grant a Rule 60(b) motion if the Appellate Court first remands the case. These cases therefore contradict Petitioner's assertion that a District Court has authority to grant Rule 60(b) relief without regard to the pendancy of an appeal.

Petitioner relies, at least in part, upon *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976) in claiming that the pendancy of an appeal does not prevent a District Court from granting Rule 60(b) relief. This reliance is based upon a fundamental misunderstanding of *Standard Oil*.

Standard Oil is of no value to Petitioner because it simply provides that a District Court can rule on a Rule 60(b) motion once an appeal has been concluded and the mandate issued. It does not state that a District Court can grant, or even deny, a Rule 60(b) motion without regard to the pendancy of an appeal. Thus, Petitioner is mistaken in his reliance upon *Standard Oil.*

Petitioner also relies on the case of *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997) for his assertion that the pendancy of an appeal does not affect a District Court's ability to grant Rule 60(b) relief. Although *Stein* does contain the referenced dicta, it is not helpful to Petitioner for a number of reasons.

Stein is a procedurally complex criminal case where the Defendant, Mr. Stein, was convicted of several crimes in a Washington state court. Mr. Stein then filed a *habeas petition* with the District Court. The District Court determined that Mr. Stein was unconstitutionally denied his state appellate rights. The District Court ordered his release only if the state did not reinstate his appellate rights within 90 days. Mr. Stein then filed a notice of appeal as to other aspects of the District Court's rulings. While the appeal was still pending, Mr. Stein filed a motion, in the District Court, seeking his immediate release. The District Court dismissed the motion due to a lack of jurisdiction.

The issue in the *Stein* appeal was whether the District Court had been divested of jurisdiction to rule on the defendant's motion for release simply because Mr. Stein had appealed other unrelated aspects of the District Court's ruling. In deciding this issue, the Appellate Court noted the general rule that "the filing of a notice of appeal divests a

District Court of jurisdiction over those aspects of the case involved the appeal [citations omitted]." *Id.* at 1189. The Appellate Court further acknowledged:

> The rationale for this general rule is that it avoids "the confusion and waste of time that might flow from putting the same issues before two courts at the same time" [citation omitted]. This general rule is thus a rule of judicial economy. It does not rest on a statute and "should not be employed to defeat its purposes nor to induce needless paper shuffling" [citation omitted].

Id.

After observing the foregoing, the *Stein* court then concluded that the District Court still had jurisdiction to consider Mr. Stein's motion because (1) the motion involved issues not placed before the Appellate Court, (2) the District Court would only be "deciding whether a condition placed on a habeas petitioner's custody has been met," and (3) the "plain language of Rule 23 gives the District Court jurisdiction concurrent with the Appeals Court over the custody of a habeas petitioner." *Id.* at 1190.

Stein does not help Petitioner for a variety of reasons. Firstly, Stein involved Rule 23 of the Federal Rules of Civil Procedure, wherein the District Court is specifically granted jurisdiction even in the event an appeal is filed. Presently, Rule 60(b) does not grant jurisdiction to a District Court while an appeal is pending. Secondly, *Stein* did not involve circumstances wherein the Petitioner was simultaneously seeking to litigate intertwined issues before two courts. Here, the Petitioner was attempting to overturn the summary

judgment both via the District Court (motion for relief) and the appellate court (appeal of summary judgment).

A third reason as to why *Stein* is not helpful to Petitioner is because Petitioner does not understand *Stein*'s dicta reference to Rule 60(b). Specifically, *Stein*, 127 F.3d at 1189 cites *Stone v. I.N.S.*, 514 U.S. 386, 401-02, 115 S. Ct. 1537, 1547-48, 131 L. Ed. 2d 465 (1995) for the parenthetical statement that "District Courts retain jurisdiction to decide Rule 60(b) motions even after an appeal is taken." Petitioner's mistaken reliance upon this dicta becomes apparent once *Stone* and the authority cited therein are reviewed.

Stone involved circumstances where the Petitioner, Mr. Stone, was seeking to avoid deportation. An administrative judge ordered that he be deported. The Board of Immigration Appeals ("BIA") affirmed the deportation order on July 26, 1991. In August, 1991, Mr. Stone sought a reconsideration of the deportation order and filed a motion for reconsideration. The BIA denied the motion on February 3, 1993. Mr. Stone thereafter petitioned to have the Court of Appeals review the original order as well as the denial of the reconsideration motion.

The *Stone* Appellate Court held that the ninety day period in which to file a reconsideration motion had not tolled the time in which Mr. Stone had to appeal the deportation order. The Court of Appeals thus dismissed Mr. Stone's Petition for want of jurisdiction as it was untimely to the extent it sought review of the July 26, 1991 order.

For reasons not here relevant, the United States Supreme Court affirmed the *Stone* Court of Appeals. As a part of reaching this ruling, the Supreme Court cited *Standard*

Oil Co. of Cal. v. United States, 429 U.S. at 18-19 as well as *11 Wright & Miller*, Federal Practice & Procedure, Section 2873 (1994 Supp.) for the dicta statement that the "pendancy of an appeal does not affect the District Court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. at 401. However, neither *Standard Oil* nor the *Wright & Miller* authority stand for the stated dicta.

As clarified above, *Standard Oil* only applies to Rule 60 motions filed after the appeal has been completed and the appellate mandate issued. Furthermore, the current version of Section 2873, contained within *Wright & Miller*, does not state that District Courts have unfettered jurisdiction to rule on Rule 60(b) motions during the pendancy of an appeal, without the need for a remand. Rather, Section 2873 actually states that a number of cases hold that, during the pendancy of an appeal, the District Court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, then application can be made to the Appellate Court for a remand. At most, Section 2873 cites *Wilkin v. Sunbeam Corp.*, 405 F.2d 165 (10th Cir. 1968) for the proposition that no appellate leave is necessary, as to a Rule 60(b) motion, after an appeal has been concluded. Thus, even the reference to *Wilkin* does not aid Petitioner as it is in accord with *Standard Oil*. As such, neither *Standard Oil* nor *11 Wright and Miller*, Federal Practice & Procedure, Section 2873 stand for the dicta contained within *Stone*.

Based upon the foregoing, the District Court could not have granted a Rule 60(b) motion without a remand from the Appellate Court. Even if a remand was not necessary, this entire issue is moot because the District Court reviewed Petitioner's reasons for requesting relief and determined that relief should be denied. Accordingly, the District Court effectively denied Petitioner's request on the merits and it is thus irrelevant as to whether the District Court even had the authority to grant relief.

CONCLUSION

In summary, the writ should be denied for a number of reasons. Firstly, there is no conflict between the Circuits as to the processing of Rule 60(b) motions during the pendancy of an appeal. Secondly, Petitioner's request for Rule 60(b) relief was processed in a manner substantially consistent with other Circuits. Thirdly, Petitioner's request was denied on the merits due to a lack of supporting facts. Fourthly, it is irrelevant as to whether the District Court could have granted Rule 60(b) relief without an appellate remand because the District Court actually denied, on the merits, Petitioner's request for relief. Fifthly, Petitioner never even appealed from the District Court's denial of Rule 60(b) relief.

Respectfully submitted,

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